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12
13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF WASHINGTON**
15 **AT SPOKANE**

16 STATE OF WASHINGTON, et al.,

17 Plaintiffs,

18 v.

19 UNITED STATES DEPARTMENT
20 OF HOMELAND SECURITY, a
21 federal agency, et al.

22 Defendants.

NO. 4:19-cv-05210-RMP

PLAINTIFFS' MOTION TO
COMPEL DOCUMENTS
WITHHELD UNDER
DELIBERATIVE PROCESS
PRIVILEGE

Noted for: November 13, 2020
Without Oral Argument

I. INTRODUCTION

Plaintiff States assert two independent challenges to Defendants' Final Rule: a statutory challenge under the Administrative Procedure Act (APA), and a constitutional challenge under the Constitution's Equal Protection guarantee. Recently, this Court permitted Plaintiffs to pursue discovery related to their Equal Protection claim, and ordered Defendants to provide an adequate privilege log so the Court could evaluate any claimed privilege. ECF No. 210.

Defendants have failed to comply. In response to Plaintiffs' discovery requests, Defendants have broadly asserted the deliberative process privilege. Defendants' invocation of the deliberative process privilege fails for two reasons. First, the deliberative process privilege does not apply where, as here, the government's decision-making process is itself at issue. Second, even if the privilege did apply, that privilege is qualified, and the factors outlined in *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984), all support disclosure. Accordingly, Plaintiffs request the Court order Defendants to produce the material they have withheld pursuant to the deliberative process privilege.¹

¹ This motion addresses the threshold question of the applicability of the deliberative process privilege to Plaintiff States' Equal Protection claim. Plaintiffs have identified additional deficiencies in Defendants' privilege logs and are negotiating with Defendants concerning these, and reserve the right to move to compel regarding the adequacy of Defendants' privilege logs. *See infra* n.2

II. BACKGROUND

Plaintiffs challenged a Final Rule published by the U.S. Department of Homeland Security (DHS), *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (Public Charge Rule or Rule), alleging violations of the APA and the Equal Protection Clause. ECF No. 31 at 161–71. As part of the Equal Protection claim, Plaintiffs allege the Rule was motivated by discriminatory intent. Am. Compl. (ECF No. 31) ¶ 430.

This Court stayed implementation of the Rule under 5 U.S.C. § 705 and also preliminarily enjoined its implementation. ECF No. 162. Defendants appealed and the Ninth Circuit issued a stay pending appeal on December 5, 2019. ECF No. 192 at 73. Meanwhile, DHS moved to dismiss Plaintiffs’ claims. ECF No. 223. On September 14, 2020, the Court denied DHS’s motion with respect to three of four counts, including the equal protection claim, finding that the alleged statements “made by high-level officials in the Administration contemporaneous with” the promulgation of the Rule “can be interpreted as supporting animus towards nonwhite immigrants.” ECF No. 248 at 42–43. On September 15, 2020, the Ninth Circuit Court of Appeals heard DHS’s appeal of the preliminary injunction; the parties await a ruling. ECF No. 192 at 73.

Parallel to the appeal and the motion to dismiss, the parties met on November 5, 2019 to develop a discovery plan. ECF No. 188. The parties disagreed on the appropriate scope of discovery, and on April 17, 2020, the Court ordered the Department to produce a privilege log in connection with documents withheld from

1 the administrative record and discovery regarding the States’ equal protection claim.
2 ECF No. 210 at 21. Given the “public-record evidence” of anti-immigrant animus
3 by officials like Kenneth Cuccinelli and Stephen Miller and the nature of the
4 “inquiry required to determine whether the relevant decisionmakers manifested a
5 discriminatory purpose,” the Court agreed that further discovery into the Equal
6 Protection claim was appropriate. *Id.* at 17, 20.

7 DHS moved to stay its obligation to produce a privilege log pending resolution
8 of a motion to dismiss. ECF No. 213. On May 13, 2020, the Court denied this
9 motion, but in the same Order directed DHS to produce the privilege log related to
10 the administrative record on a rolling basis every two weeks starting on June 12,
11 2020. ECF No. 219 at 6. The most current privilege log of documents withheld from
12 the administrative record contains 208 documents, all but one of which DHS has
13 marked as protected by the deliberative process privilege. *See* Declaration of
14 Jeffrey T. Sprung (Sprung Decl.), ¶ 2, Ex. A.

15 The States served their first requests for production (RFPs) on DHS on
16 July 14, 2020. Sprung Decl., ¶ 3 and Ex. B. The RFPs sought information relevant
17 to the States’ claim that the Public Charge Rule was motivated in part by the
18 Defendants’ animus and discriminatory intent towards non-European immigrants on
19 the basis of race, ethnicity, or national origin. *Id.* DHS agreed to produce documents
20 subject to various objections. *Id.*, ¶ 5 and Ex. C at 6, ¶ 1.

21 On August 28, DHS transmitted its first production, consisting of 76
22 documents, many of which are agency public relations department “news clips” that

1 summarize media articles, span over 100 pages, and offer no information regarding
 2 the effects of the Public Charge Rule; the remaining documents are heavily redacted.
 3 *Id.* at ¶ 6, Ex. D. On September 18, 2020, DHS produced a six-page partial privilege
 4 log of documents withheld from equal protection discovery. *Id.* at ¶ 7, Ex. E. On
 5 September 25, 2020, DHS made a second production of documents, consisting
 6 almost entirely of irrelevant “news clips.” *See, e.g., id.* at ¶ 8, Ex. F. DHS updated
 7 its partial privilege log of documents withheld from equal protection discovery on
 8 October 2, 2020. *Id.* at ¶ 9, Ex. G. In total, of DHS’s 54 entries on the partial privilege
 9 log, 37 of them assert the deliberative process privilege.

10 On September 27, 2020, Plaintiffs inquired whether Defendants intended to
 11 revise their privilege logs and reconsider their invocation of the deliberative process
 12 privilege. *Id.* at ¶ 10, Ex. H. Defendants responded that they disagreed with
 13 Plaintiffs’ position that the deliberative process privilege does not apply. *Id.* at ¶ 11,
 14 Ex. I. Plaintiffs now move for an order compelling Defendants to produce the
 15 documents and information they have withheld under the privilege.

16 III. ARGUMENT

17 A. The Deliberative Process Privilege Does Not Apply to Discovery on 18 Plaintiff’s Constitutional Claim

19 The deliberative process privilege applies to documents that “reflect[]
 20 advisory opinions, recommendations and deliberations comprising part of a process
 21 by which governmental decisions and policies are formulated.” *NLRB v. Sears,*
 22 *Roebuck & Co.*, 421 U.S. 132, 150 (1975). Courts in the Ninth Circuit and elsewhere,

1 however, have held that the privilege does not apply to a challenge of an agency's
 2 decision-making process, including its intent in taking certain actions. The D.C.
 3 Circuit, for instance, reasoned that the deliberative process privilege "evaporates"
 4 when "a plaintiff's cause of action turns on the government's intent":

5 The privilege was fashioned in cases where the governmental decision-
 6 making process is collateral to the plaintiff's suit. **If the plaintiff's**
 7 **cause of action is directed at the government's intent, however, it**
 8 **makes no sense to permit the government to use the privilege as a**
 9 **shield.** For instance, it seems rather obvious to us that the privilege has
 10 no place in a Title VII action **or in a constitutional claim for**
 11 **discrimination** [I]f either the Constitution or a statute makes the
 12 nature of governmental officials' deliberations the issue, the privilege
 is a non-sequitur. The central purpose of the privilege is to foster
 government decision-making by protecting it from the chill of
 potential disclosure. If Congress creates a cause of action that
 deliberatively exposes government decisionmaking to the light, the
 privilege's raison d'être evaporates.

13 *In re Subpoena Duces Tecum Served on the Office of the Comptroller of Currency,*
 14 145 F.3d 1422, 1424 (D.C. Cir.), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998)
 15 (emphasis added). Though the Ninth Circuit has yet to address *In re Subpoena*, other
 16 courts within this Circuit have echoed its reasoning. In *Jones v. Hernandez*, No. 16-
 17 CV-1986-W(WVG), 2017 WL 3020930 (S.D. Cal. July 14, 2017), for instance, the
 18 court cited *Subpoena* approvingly and explained that a court "may deny the
 19 protection of the deliberative process privilege, regardless of the balancing
 20 test . . . (1) when there is reason to believe that the documents sought may shed light
 21 on government misconduct, and (2) when the agency's decision-making process is
 22 itself at issue." *Jones*, 2017 WL 3020930, at *3 (citations omitted). Another court

1 found the reasoning of *Subpoena* “highly persuasive,” concluding that “the fact that
 2 the decisionmaking process is at issue . . . weighs heavily against Respondent’s
 3 assertion of privilege.” *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1021 (E.D. Cal.
 4 2010). Others in the Ninth Circuit have echoed the reasoning of *Subpoena* without
 5 specifically invoking the case. *See, e.g., Greenpeace v. Nat’l Marine Fisheries Serv.*,
 6 198 F.R.D. 540, 543 (W.D. Wash. 2000) (“the [deliberative process] privilege may
 7 be inapplicable where the agency’s decision-making process is itself at issue”).

8 Many other courts across the country similarly hold the deliberative process
 9 privilege inapplicable where plaintiffs’ claims involve the government’s intent or
 10 decision-making process. *See, e.g., Burbar v. Inc. Vill. of Garden City*, 303 F.R.D.
 11 9, 14 (E.D.N.Y. 2014) (deliberative process privilege “inapplicable” where the
 12 “decision making process of the [government] Defendants are unquestionably at the
 13 heart of these claims,” noting “when the decision-making process itself is the subject
 14 of the litigation, the deliberative process privilege cannot be a bar to discovery and
 15 the privilege evaporates.”); *Children First Found., Inc. v. Martinez*, No. 1:04-CV-
 16 0927, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) (deliberative process
 17 privilege must “disappear” when “the crux of the [plaintiffs’] case” was “the process
 18 by which Defendants made their decision . . . [and their] subjective motives”);
 19 *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 245 F.R.D. 393, 397 (S.D. Iowa 2007)
 20 (privilege did not apply where plaintiff alleged that the deliberative process itself
 21 was “tainted with unlawful discrimination”); *Azon v. Long Island R.R.*, CIV-6031,
 22 2001 WL 1658219, at *3 (S.D.N.Y. Dec. 26, 2001) (“[W]hen the subject of the

litigation, as here, is the very nature of the decision-making process, the privilege should not foreclose the production of critical information.”); *Burka v. New York City Transit Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (“Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information.”).

Here, as this Court has already recognized, Defendants’ decision-making process is central to Plaintiffs’ Equal Protection claim. Where, as here, “there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public’s interest in honest, effective government.” *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (quotations omitted). The deliberative process privilege is thus inapplicable, and Defendants cannot use it to shield documents from discovery.

B. Even if the Deliberative Process Privilege Applied, the *Warner* Factors Favor Disclosure

Even if the deliberative process privilege applied, it is qualified, not absolute. *See Warner*, 742 F.2d at 1161. In deciding whether the qualified privilege should be overcome, courts examine four factors: “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (quoting *Warner*, 742 F.2d at 1161). “[T]he deliberative process privilege

1 is narrowly construed” and Defendants bear the burden of establishing its
 2 applicability. *Greenpeace*, 198 F.R.D. at 543 (citations omitted). “Blanket” privilege
 3 assertions are “insufficient”; Defendants must provide “‘precise and certain’ reasons
 4 for preserving the confidentiality of designated material.” *Id.*

5 Each of the *Warner* factors favor the Plaintiffs. First, records describing
 6 Defendants’ deliberations would shed light on whether discriminatory animus
 7 motivated their enactment of the Public Charge Rule. As such, the records are clearly
 8 relevant to Plaintiffs’ Equal Protection Claims. *See N. Pacifica, LLC v. City of*
 9 *Pacifica*, 274 F. Supp. 2d 1118, 1124 (N.D. Cal. 2003) (evidence of the “motive and
 10 intent of City Council members” was “highly relevant to [plaintiff’s] equal
 11 protection claim” because plaintiff must demonstrate “there was no rational basis for
 12 the difference in treatment or the difference in treatment was motivated by animus”).
 13 Moreover, this discovery is relevant to Plaintiffs’ constitutional claims and thus
 14 enforcement of federal rights. *See, e.g., Surf & Sand, LLC v. City of Capitola*, No. C
 15 09-05542, 2010 WL 4393886, at *3 (N.D. Cal. Oct. 29, 2010) (“First, the above-
 16 captioned action involves federal constitutional claims, and the federal interest in the
 17 enforcement of federal constitutional rights weighs in favor of disclosure.”).

18 Second, Plaintiffs are unable to access evidence of Defendants’ intent through
 19 other mean, as the “evidence sought is primarily, if not exclusively, under [the
 20 government’s] control, and the government . . . is a party to and the focus of the
 21 litigation.” *Karnoski*, 926 F.3d at 1206. While the portions of the administrative
 22 record that have been produced provide some details on Defendants’ decision-

1 making process, evidence of discriminatory intent “does not typically lay dormant
 2 in an administrative record.” *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D.
 3 628, 639 (S.D. Cal. 2001). Further, Defendants assert the deliberative process
 4 privilege repeatedly in withholding documents from the administrative record. And
 5 though there are indications of discriminatory animus based on public comments by
 6 Stephen Miller and others, only internal communications can truly provide direct
 7 evidence of how such animus motivated the policy change. *See Vill. of Arlington*
 8 *Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (determining whether
 9 invidious discriminatory purpose was a motivating factor “demands a sensitive
 10 inquiry into such circumstantial and direct evidence of intent as may be available.”).

11 Third, the government’s role in the litigation also weighs in favor of
 12 disclosure, as Plaintiffs allege that the government engaged in invidious
 13 discrimination in promulgating the Rule because it was motivated by racial animus
 14 against nonwhite immigrants. This Court rejected Defendants’ attempt to dismiss
 15 Plaintiffs’ Equal Protection claim, noting that public statements by Defendants
 16 raised an “inference that an ‘invidious discriminatory purpose was a motivating
 17 factor’” in finalizing the Public Charge Rule. ECF No. 248 at 30–43. That
 18 Defendants are the governmental actors, whose intent at issue goes to the heart of
 19 the Equal Protection claim, supports disclosure. *See All. for the Wild Rockies v.*
 20 *Pena*, No. 2:16-CV-294-RMP, 2017 WL 8778579, at *7 (E.D. Wash. Dec. 12, 2017)
 21 (“Because the Forest Service and its employees are defendants in this
 22 litigation . . . the third *Warner* factor regarding governmental involvement favors

disclosure”); *see also N. Pacifica*, 274 F. Supp. 2d at 1124 (government’s defendant role favored disclosure because its “decision-making process [was] by no means collateral to” plaintiff’s equal protection claim); *Newport*, 200 F.R.D. at 640 (noting that the “role of the government in the litigation itself”—being sued for, *inter alia*, violation of equal protection—“tip[s] the scales in favor of disclosure”).

Fourth, any risk that disclosure would hinder frank and independent discussion regarding contemplated policies and decisions could be mitigated by the existence of a protective order, which Plaintiffs have proposed. *See Rodriguez v. City of Fontana*, No. EDCV 16-1903-JGB (KKX), 2017 WL 4676261, at *4 (C.D. Cal. Oct. 17, 2017) (“[T]he Court finds disclosure of the information sought subject to an appropriate protective order will not harm the generally asserted governmental interest in confidentiality of performance evaluations.”).

Taken together, all of the *Warner* factors favor the Plaintiffs’ and public’s interest in disclosure, and far outweigh any interest in nondisclosure. Defendants failed to properly invoke or apply the Deliberative Process Privilege to the withheld documents. These documents are critical to discovery on Plaintiffs’ Equal Protection claim, and they must be produced without redactions.

IV. CONCLUSION

For the foregoing reasons Plaintiffs’ Motion to Compel should be granted. Plaintiffs respectfully request that the Court order Defendants to produce the material withheld pursuant to the deliberative process privilege without redactions.

1 RESPECTFULLY SUBMITTED this 14th day of October 2020.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 14th day of October 2020, at Seattle, Washington.

s/ Spencer W. Coates

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